No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee.

vs.

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,

Appellants.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

THOMAS R. SHERIDAN,
Assistant United States Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

RULES

No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee.

vs.

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,

Appellants.

APPELLEE'S BRIEF.

I.
JURISDICTION.

On March 12, 1958, appellants, along with Eddie Jewel Bryant and Juanita Smith, were indicted by the Federal Grand Jury in and for the Southern District of California for selling, receiving, concealing, and transporting a narcotic drug, heroin, and for conspiring to do the same in violation of 21 U. S. C. 174 and 18 U. S. C. 371.

All the defendants were arraigned, and after the pretrial motions to suppress evidence, to appoint a psychiatrist, and to obtain a bill of particulars were ruled upon, and after all of the defendants had entered their plea of not guilty, the defendants were tried by a jury in the United States District Court for the Southern District of California, Central Division, before the Honorable Ben

Harrison. After six trial days the jury, on May 28, 1958, found each of the appellants guilty as charged. On June 13, 1958, United States District Judge Ben Harrison sentenced appellant Williams to a total of ten years imprisonment and $5,000 fine and sentenced appellant Cook to a total of five years imprisonment.

The District Court had jurisdiction of the cause of action under 21 U. S. C. 174, 18 U. S. C. 371, and 18 U. S. C. 3231. The jurisdiction of this Court is invoked under 28 U. S. C. 1291, 1294(1).

II.
STATUTES INVOLVED.

The indictment charges violations of Title 21, U. S. C., Section 174, and Title 18, U. S. C., Section 371, which statutes are quoted below:

Title 21, U. S. C., Section 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954."

Title 18, U. S. C., Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined no more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

III.
STATEMENT OF THE CASE.

On February 24, 1958, United States Commissioner Theodore Hocke, Los Angeles, California, issued a search warrant to an agent of the Federal Bureau of Narcotics authorizing a search of 5417½ South Wilton. [Tr. pp. 7-10.]*

---

*"Tr." stands for the Transcript of Record. "R. Tr." stands for the Reporter's Transcript of Proceedings.

On February 24, 1958, appellants, along with two others, were arrested, and 5417½ South Wilton was searched. [R. Tr. pp. 272, 277, 278, 280, 316, 347.]

On February 25, 1958, complaints were filed before United States Commissioner Theodore Hocke charging each of the appellants with the sale and facilitation of the sale of approximately three ounces of heroin; the appellants were arraigned before the Commissioner and committed by the Commissioner into the custody of the United States Marshal. [Tr. pp. 1-6.] Federal Narcotics Agent Malcolm Richards filed with the same United States Commissioner the executed return of the search warrant. [Tr. 8.]

On March 12, 1958, the Federal Grand Jury in and for the Southern District of California returned an eight-count indictment against appellants Ruth Johnson Williams and Fred Cook, Jr., and Eddie Jewel Bryant and Juanita Smith charging in substance as follows:

Count One: On February 14, 1958, Bryant sold 403 grains of heroin to Justin Burley;

Count Two: On February 17, 1958, Smith and Bryant sold 303 grains of heroin to Justin Burley;

Count Three: On February 17, 1958, Smith received, concealed, and facilitated the transportation of 303 grains of heroin;

Count Four: On February 21, 1958, Bryant received, concealed, and facilitated the transportation of 390 grains of heroin;

Count Five: On February 24, 1958, Williams, Bryant, and Cook sold 2 ounces, 339 grains of heroin to Justin Burley;

Count Six: On February 24, 1958, Williams, Bryant and Cook received, concealed, and facilitated the transportation of 2 ounces, 339 grains of heroin;

Count Seven: On February 24, 1958, Williams received, concealed, and facilitated the concealment of 3 ounces, 404 grains of heroin;

Count Eight: Beginning on February 14, 1958, and continuing to the date of the indictment, Williams, Smith, Bryant, and Cook conspired to sell, receive, conceal, and facilitate the transportation and concealment of heroin; overt acts duplicating Counts One, Three, Six, and Seven) were set forth in the indictment. [Tr. pp. 12-17.]

On March 17, 1958, defendant Eddie Jewel Bryant (the only defendant still in custody at that time) was arraigned on the indictment before Honorable Wm. M. Byrne.

On March 31, 1958, appellants and defendant Smith were arraigned before Honorable Wm. M. Byrne. Appellant Cook, through his attorney, Wm. H. Neblett, moved the court for the appointment of a psychiatrist to examine Cook, and the court granted this motion. [Tr. p. 18.]

On April 21, 1958, all four defendants, including the appellants, plead not guilty to the indictment before Honorable Thurmond Clarke, and the motions to suppress filed by appellants, the hearing on appellant Cook's sanity, and the motions of Smith and Bryant were continued to May 27, 1958. [Tr. p. 30.]

On April 22, 1958, Judge Clarke vacated the date set for hearing the motions and ordered that they be heard before Honorable Peirson M. Hall on April 24, 1958. [Tr.

p. 31.] This was done pursuant to Chapter II, Rule III (8) and (9), Local Rules, Southern District, California.

On April 24, 1958, defendant Bryant plead guilty to Counts Five and Eight of the indictment before Judge Clarke; Honorable Peirson M. Hall transferred the case for all further proceedings to Honorable Wm. C. Mathes. [Tr. p. 32.]

On April 28, 1958, before Judge Mathes, defendant Smith's motion for a bill of particulars was withdrawn; the report of the psychiatrist who had examined appellant Cook was filed, and the court found that Cook was competent to stand trial; evidence was taken on appellant Williams' motion to suppress evidence, and the motion was denied; the case was set for jury trial. [Tr. pp. 33-38; R. Tr. pp. 248-368.]

On May 1, 1958, before Judge Mathes, defendant Bryant withdrew her plea of guilty to Counts Five and Eight of the indictment and plead not guilty; the court denied the Government's motion to increase the bail of all four defendants. [Tr. pp. 39-40.]

On May 19, 1958, Judge Mathes again denied appellants' motion to suppress evidence. [Tr. p. 60.]

On May 20, 1958, Judge Mathes ordered the case transferred for trial to Honorable Ben Harrison. [Tr. p. 61.]

On May 20, 1958, before Judge Harrison, a jury was impaneled and trial commenced. [Tr. pp. 62-65.] The trial continued on May 21, 22, 23, 27 and 28. [Tr. pp. 66-80.]

On May 28, 1958, the jury returned a verdict in which it found:

1. Appellant Williams guilty on all counts charged: 5, 6, 7 and 8. [Tr. p. 81.]
2. Appellant Cook guilty on all counts charged: 5, 6 and 8. [Tr. p. 82.]
3. Defendant Bryant guilty on all counts charged 1, 2, 4, 5, 6 and 8.
4. Defendant Smith not guilty on any counts charged: 2, 3 and 8.

On June 2, 1958, appellants Williams and Cook moved the trial court for a judgment of acquittal or, in the alternative, for a new trial. [Tr. pp. 83-89.]

On June 9, 1959, before Judge Harrison, appellants' motions for new trials or judgments of acquittal were heard and continued; the Government filed an information alleging that appellant Williams had a prior federal narcotic conviction; Williams was arraigned on this information and admitted its truth. [Tr. p. 91.]

On June 13, 1958, Judge Harrison heard further argument on appellants' motions for new trials or judgments of acquittal, and denied said motions. Judge Harrison sentenced appellant Williams to ten years and $5,000 on Counts 5, 6, and 8, and five years on Count 8, to begin and run concurrently each with the other, for a total of ten years and $5,000. Judge Harrison sentenced appellant Cook to five years on Counts 5, 6, and 8 to begin and run concurrently each with the other, for a total of five years. [Tr. pp. 93-101.]

On June 17, 1958, appellants filed a notice of appeal, and Judge Harrison granted bail pending appeal. [Tr. pp. 102-104.]

On June 25, 1958, appellants filed in the District Court their Designation of Contents of Record on Appeal in which the entire record was designated. [Tr. pp. 105-110.]

On January 23, 1959, appellants filed in the United States Court of Appeals for the Ninth Circuit their statement of points upon which they intend to rely in this appeal. Although 13 different points were specified, they may be generally grouped as follows:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California, was illegal (Points I-V, VII);
2. Appellant Cook's confession was inadmissible (Point VI);
3. The trial court should have granted the appellants' motions for judgments of acquittal or for new trials (Points VIII, XIII);
4. The trial court should not have given any instructions on conspiracy to the jury as there was no substantial evidence of a conspiracy (Point IX);
5. The evidence is insufficient (Points X-XII).

On May 4, 1959, appellee received appellants' brief, in which appellants assign eleven errors to rulings of the trial court, and five points are argued. The eleven assigned errors may be generally grouped as follows:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California, was illegal. (Ap. Brief, p. 23. Errors 1-4, p.)*

---

*"Ap. Brief" stands for Appellants' Brief on Appeal.

2. Appellant Cook's confession was inadmissible. (Ap. Brief, p. 26. Error 7.)

3. The trial court should have granted the appellants' motions for judgments of acquittal or for new trials. (Ap. Brief, pp. 24, 27, 28. Errors 5, 8-11.)

Appellants, in their brief, argue the following summarized five points:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California, was illegal;

2. The evidence obtained from this search and seizure is not admissible;

3. The government witnesses lied regarding the arrest of appellant Williams as proved by the United States Commissioner's file;

4. The government failed to disclose the identity of the informer;

5. The evidence was insufficient to sustain the convictions.

IV.
STATEMENT OF FACTS.

In the latter part of January, 1958, or the early part of February, 1958, a confidential informant, Jesse Thomas, advised the narcotics officers that Ruth Williams was selling narcotics out of 5417½ South Wilton Place, Los Angeles, California, and was a source of heroin for Eddie Jewel Bryant. [R. Tr. pp. 238, 286, 289-290.]

On February 10, 1958, Justin B. Burley, a Deputy Sheriff of the Los Angeles County Sheriff's Office assigned to the narcotics detail, met Jesse Thomas, an informant or "special employee" and made arrangements to

meet defendant Eddie Jewel Bryant. [R. Tr. pp. 95-98.] After Jessee Thomas had apparently purchased $50 worth of heroin from Bryant with Official Advance Funds of the Federal Government, Justin Burley was introduced to Bryant as a brother of Jesse Thomas. [R. Tr. pp. 95-99.] The Deputy Sheriff was not present when the informer received the "stuff," but the informer passed the "stuff" over to the Deputy in the presence of defendant Bryant. [R. Tr. pp. 99-100.] There is no substantive count in the indictment relating to this transfer.

On February 13, 1958, Deputy Sheriff Burley picked up the informant, Jesse Thomas, and met other deputies and federal agents at a drive-in. [R. Tr. pp. 102, 179.] At approximately 11:00 that morning Jesse Thomas and Deputy Burley made a telephone call to defendant Bryant, and immediately thereafter met defendant Bryant at a street corner. [R. Tr. pp. 103, 109, 179.] The deputy and the informer entered Bryant's vehicle; wherein, the deputy negotiated with Bryant for the purchase of one-half ounce of heroin for $250 which was paid to her then and there but the delivery of heroin was to be arranged by subsequent telephone call. [R. Tr. pp. 103-105.] Deputy Burley received constant coverage from his fellow officers from the time he met defendant Bryant until he rejoined his covering officers. [R. Tr. pp. 105, 179-181.] At about 12:50 p.m. the same day, Deputy Burley and Jesse Thomas telephoned Bryant and, upon hanging up, immediately proceeded to 4015 Kansas Avenue, Los Angeles, California, the home of defendant Bryant. [R. Tr. pp. 105-106.] The undercover deputy sheriff and the informer entered Bryant's home and were told by Bryant

that she had not been able to contact her connection. [R. Tr. pp. 107-108.] After waiting in Bryant's home for about three hours without being able to "score," the deputy left the residence, conferred with his fellow agents, returned to the residence, got his $250 back from Bryant, and again met with the other agents. [R. Tr. pp. 108-109.] Deputy Burley was covered by his fellow agents during this entire period. [R. Tr. pp. 105-108.]

The events that occurred on the 13th of February, 1958, were not the basis of a substantive count in the indictment. Appellee also stresses that after the 13th of February, 1958, the informant, Jesse Thomas, had absolutely no further connection with the sequence of events culminating in appellants' convictions.

On February 14, 1958, Deputy Burley telephoned defendant Bryant and she told him she was "ready to do business." [R. Tr. pp. 110, 182.] The deputy proceeded to Bryant's residence, entered, and conferred with Bryant regarding the purchase of heroin. [R. Tr. pp. 111, 183.] The deputy gave Bryant $250 of Official Advance Funds, at which time Bryant telephoned "Nita," and said "I have the money and I will be right over." [R. Tr. p. 112.] Bryant then left 4015 Kansas Avenue, Los Angeles, California, but returned in five minutes and advised the deputy that the deal was working. [R. Tr. pp. 113, 183.] By way of parenthetical remark, as it has no direct bearing on this appeal, defendant Juanita Smith resided at 4011 Kansas Avenue, Los Angeles, California—the next door neighbor of defendant Bryant. [R. Tr. p. 390.]

A short time later, while Bryant and the deputy were waiting in Bryant's home, the expected telephoned call

came, and Bryant made arrangements to meet some one near 54th Street and Wilton in Los Angeles, California. [R. Tr. p. 114.] The deputy and Bryant left Bryant's home, entered Bryant's vehicle, and proceeded to the corner of 54th Street and Van Ness in Los Angeles, California, where Bryant told the deputy to wait on the corner. [R. Tr. p. 114.] Deputy Burley observed Bryant's car travel the few blocks to 54th and Wilton and there disappear from his view. [R. Tr. p. 115.]

Covering deputies and agents observed the above detailed sequence of events, including: the deputy telephoning [R. Tr. p. 182], the deputy entering Bryant's home [R. Tr. p. 183], Bryant leaving her home and entering 4011 Kansas Avenue—the house next door to Bryant's [R. Tr. p. 183], and the deputy and Bryant leaving Bryant's home and entering her automobile. [R. Tr. p. 183.] These same covering agents attempted to pursue Bryant's vehicle without being detected, but lost her in traffic around 48th Street [R. Tr. p. 184]; however, they again observed the vehicle about 25 minutes later with Bryant and Deputy Burley in it when it arrived back at Bryant's home, at which time Burley left Bryant and subsequently met with these covering agents. [R. Tr. p. 185].

Deputy Burley waited on the street corner for about 10 or 15 minutes; then Bryant reappeared in her vehicle, picked up Burley, and handed Burley a contraceptive containing approximately one ounce of heroin. [R. Tr. p. 115; Government's Exhibit I.]

The above-related facts happened on February 14, 1958, and relate to counts one and eight of the indictment.

On February 17, 1958, Deputy Burley telephoned Bryant and arranged to purchase an ounce of heroin. [R. Tr. p. 121.] The deputy then drove to Bryant's home, parked his car, and was admitted by Bryant into her home. [R. Tr. p. 121.] There was another person in the home at this time named Jimmy, but he was not a witness at the trial. [R. Tr. p. 122.] The deputy discussed the possibility of bigger buys of narcotics with Bryant who advised the deputy that it could be arranged. [R. Tr. p. 123.] The deputy then handed Bryant $250 of Official Advance Funds, joined "Jimmy" in the other room, and overheard Bryant talk on the telephone and ask for "Juanita." [R. Tr. pp. 123-124.] A little later, Deputy Burley overheard Bryant telephone again and ask for Juanita. [R. Tr. p. 125.] Ten or fifteen minutes later Deputy Burley saw Bryant answer the front door and talk to what sounded like a woman whom Bryant subsequently identified as being "Juanita." [R. Tr. p. 126.] Although Deputy Burley could not and did not see the caller, the covering agents outside the house saw this caller and identified her as Juanita Smith. [R. Tr. pp. 187-191.] Forty-five minutes after Juanita Smith left and Bryant told Deputy Burley that the deal was working, a little girl rang the doorbell but Bryant would not open the door. [R. Tr. pp. 126-127.] Then, eight minutes later Juanita Smith rang the doorbell, Bryant met her at the door, and Juanita left. [R. Tr. pp. 126-127.] Bryant immediately returned to the deputy and handed him a contraceptive which contained 303 grains of heroin. [R. Tr. pp. 127-128.]

Deputy Sheriff Farrington, on this same date, was one of the covering officers. [R. Tr. p. 186.] He observed

Deputy Burley make a telephone call, and shortly thereafter enter Bryant's residence at 4015 Kansas Avenue, Los Angeles, California. [R. Tr. p. 187.] He then "staked out" in such a position that he was able to see the entire front of Bryant's house and part of one side. [R. Tr. pp. 187-195.] After some wait, he observed Juanita Smith and appellant Ruth Williams drive up in a 1957 green Chevrolet belonging to Fred Cook [R. Tr. p. 530], and park between 4011 and 4009 Kansas Avenue. Williams entered 4011 Kansas Avenue, Smith went to the door of 4015 Kansas Avenue; and then both Williams and Smith returned to the vehicle and drove off. [R. Tr. pp. 187-191.] Deputy Sheriff Landry and Federal agent Richards followed Smith and Williams to 5417½ South Wilton Place, Los Angeles, California, waited a short time, and then returned to 4015 Kansas Avenue. [R. Tr. pp. 530-531.] About 35 minutes later, Farrington saw Juanita Smith drive up to 4015 Kansas Avenue, Los Angeles, California, in a 1957 Ford which belonged to appellant Ruth Williams alias Johnson. [R. Tr. p. 533.] Smith went into Bryant's home for a few minutes, came out, and drove away in Cook's car. [R. Tr. pp. 191-192.] Deputy Sheriff Gillette was with Deputy Farrington and testified to the same events. [R. Tr. pp. 487-489.] Deputy Sheriff Landry was also "staked out" but in a different location; he testified to the same events. [R. Tr. pp. 527-534.]

As soon as Bryant handed Deputy Burley the contraceptive containing heroin, Burley left Bryant's home, met with his covering officers, and all present initialed the contraceptive. [R. Tr. pp. 127-128, 193.]

The above related facts happened on February 17, 1958, and pertain to counts two, three and eight of the indictment.

On February 20, 1958, Deputy Burley met defendant Bryant "by accident," that is, without any prearrangement, in the Los Angeles Municipal Court. [R. Tr. p. 130.] At that time, Bryant—referring back to their conversation on February 17, 1958—informed Burley that her (Bryant's) connection agreed to sell three ounces of heroin for $700 or four ounces for $750, and Burley said he would see her soon. [R. Tr. pp. 131-132.]

On February 21, 1958, there was a repeat performance of the transaction on February 14, 1958. On February 21, 1958, Burley telephoned Bryant; Burley went to Bryant's home at 4015 Kansas Avenue, Los Angeles, California, entered this residence and talked to Bryant; Burley and Bryant left Bryant's home, entered Bryant's vehicle, and drove to 54th and Van Ness in Los Angeles, California, where Burley left the vehicle and waited on that corner. [R. Tr. pp. 132-134.] About 15 minutes later, Bryant returned to the corner, picked up Burley, and handed him a contraceptive containing 390 grains of heroin. [R. Tr. pp. 134-135.]

On this date Deputy Sheriff Farrington was one of the covering officers. He observed: Burley make a telephone call, Burley enter Bryant's home, Burley and Bryant leave Bryant's home and drive off in Bryant's vehicle. [R. Tr. p. 196.] He further observed: Burley get out of Bryant's car on the corner of 54th and Van Ness, Bryant drive to 5417½ South Wilton Place, Los Angeles, California, the home of appellant Ruth Williams. [R. Tr.

pp. 196-197.] Deputy Farrington then saw Bryant enter 5417½ South Wilton Place, Los Angeles, California. [R. Tr. p. 199.] Shortly thereafter Deputy Farrington saw Bryant leave the alley alongside 5417½ South Wilton Place, drive away in her vehicle, pick up Burley on the street corner, and return to her home. [R. Tr. pp. 199-200.] Farrington then met with Burley and the other officers and initialed the evidence. [R. Tr. p. 200.]

Deputy Sheriff Gillette was with Deputy Farrington on February 21, 1958, and he observed the same events. [R. Tr. pp. 489-493.]

The above related facts pertain to counts four and eight of the indictment.

On February 24, 1958, the sequence of events and the time of their occurrence is very important. This was to be the day of the "big buy."

In the morning of February 24, 1958, the agents prepared $750 of Official Advance Funds by recording the serial number of each bill and by dusting each bill with a fluorescent powder which is invisible to the naked eye but fluoresces in color under an ultraviolet or "black" light. [R. Tr. pp. 136, 222, 230-233, 540, 563-565.] Federal Narcotics Agent Malcolm Richards appeared before United States Commissioner Theodore Hocke and obtained a search warrant for 5417½ South Wilton Place. [Tr. p. 10.] The stage was thus set.

At about noon on February 24, 1958, Deputy Burley telephoned Bryant and advised her he was ready "to do the big thing." [R. Tr. p. 137.] Burley drove to Bryant's home, entered therein at about 1:00 o'clock and agreed to purchase 3 ounces of heroin from Bryant for

$750 which he gave her. [R. Tr. p. 138.] A short time later Bryant answered the doorbell spoke briefly to a man Burley could not see from where he was, returned to Burley in the bedroom and advised him that there was a slip-up in that her connection misunderstood the order and sent over 3 half pieces (half ounces) rather than 3 whole pieces (ounces), but he would be back shortly with the other 3 halves. [R. Tr. pp. 138-139.] About 20 minutes later Bryant again answered the front door, talked briefly to a man, returned to Burley in the bedroom, and handed him 3 more contraceptives containing heroin. [R. Tr. p. 139.] After Burley had received 6 contraceptives containing heroin from Bryant he left Bryant's home and conferred with Agents Richards and Gilkey. [R. Tr. p. 141.] Burley then met Sheriff's Deputies Farrington and Smith (a female deputy) and Federal Narcotics Agents Abe and Roumo and returned to Bryant's home. [R. Tr. p. 142.] Bryant was arrested in her home by these officers and $150 (one fifty and ten ten dollar bills) of the original $750 given to Bryant by Burley was recovered from Bryant's purse. [R. Tr. pp. 219-230.] This ended the roles of Bryant and Burley.

We must now flash back to the observed activities of the appellants on this day. All eight of the covering officers assembled in the area of the phone booth when Deputy Burley telephoned Bryant at about noon. The following officers were present: Deputy Sheriffs Burley, Farrington, Landry, Gillette and Smith; Federal Narcotics Agents Richards, Gilkey, Abe and Ruomo. [Rep. Tr. pp. 136, 137, 201, 493, 539.]

Four of these covering officers: Farrington, Smith, Abe, and Ruomo took up positions at Bryant's home at

4015 Kansas Avenue, Los Angeles, California. [R. Tr. p. 201.] The other four officers proceeded to positions at the home of appellant Williams, 5417½ South Wilton Place, Los Angeles, California. [R. Tr. pp. 493, 539.] Agent Richards moved between these two groups as a sort of coordinator. [R. Tr. p. 291.] We shall move from group to group in order to see the events unfold chronologically.

At about 12:40 P.M. Deputies Gillette and Landry "staked out" in a yard across the alley from the home of Appellant Williams. [R. Tr. pp. 493-498, 540, 541.]

Around 1:00 P.M. these two officers saw appellant Williams come out of her home on the second floor, walk down the stairway, disappear from their vision around the corner of her yard (towards where the trash cans are kept in which some 4 ounces of heroin were subsequently found), reappear some few minutes later, walk up the stairs, and apparently re-enter her home. [R. Tr. pp. 498, 542.] A few minutes later, around 1:10 P.M., appellant Fred Cook, Jr., walked down the same stairs carrying some clothing. [R. Tr. pp. 498, 543.]

We now switch to Bryant's home where Deputy Farrington observed that about 1:20 P.M. appellant Cook drove up in his car, parked, walked to and entered Bryant's home carrying some clothing, remained inside for several minutes, left Bryant's home carrying the same clothing, entered his car and drove off. [R. Tr. pp. 201, 202.]

Deputies Gillette and Landry, back at appellant Williams' home, at about 1:40 P.M., saw appellant Cook walk up the stairs to appellant Williams' home carrying the same clothing he had left with. [R. Tr. pp. 498, 543.] Some five or ten minutes later appellant Cook was again ob-

served walking down the same stairway carrying the same clothing. [R. Tr. pp. 598, 599, 544.]

Again switching to Bryant's residence, at 1:50 P.M. Deputy Farrington observed appellant Cook drive up to Bryant's home, park, enter Bryant's home carrying the same clothing, come out of Bryant's home a few minutes later carrying the same clothing, enter his car and drive off. [R. Tr. pp. 202, 203.]

At about 2:00 P.M. the officers around appellant Williams' house observed appellant Cook walk up the stairs carrying the same clothing he had left with on both occasions. [R. Tr. pp. 499, 544.]

At about this time, 2:00 P.M., Deputy Burley left Bryant's home and conferred with the officers who had been covering Bryant's home as well as two agents who had been at appellant Williams' home for part of the time, and showed them the evidence as he advised them of the events as he saw them from inside the house. [R. Tr. pp. 141, 204.] Deputy Burley, accompanied by Deputies Farrington and Smith, and Federal Agents Abe and Ruomo, then returned to Bryant's home and arrested her. [R. Tr. pp. 142, 205-218.] After Deputy Farrington assisted in the search of Bryant's home and the recovery of some of the marked money, he joined the other agents and deputies in the area of appellant Williams' home. [R. Tr. p. 230.] It was now about 3:00 P.M., and the agents were ready for the final scene.

Federal Agents Richards and Gilkey and Deputy Sheriffs Landry, Farrington, and Gillette approached 5417½ South Wilton Place, and all but Agent Gilkey walked up the stairs to the door of this residence. [R. Tr. pp. 230, 234, 238, 271, 275, 277, 303, 346, 349.] Deputy Gillette

knocked on the door several times; there was no answer; he tried the door which opened; they walked in. [R. Tr. pp. 238, 271, 282, 283, 303, 347, 349, 413.] Once in the house, the officers immediately saw appellant Williams standing in the doorway of the bedroom. [R. Tr. pp. 277, 347, 349.] Deputy Gillette showed appellant Williams his badge and told her she was under arrest for violation of federal narcotics laws and anything she may say may be used against her. [R. Tr. pp. 99, 234, 271-272, 278, 280, 293-294, 302, 304, 325-326, 332, 349, 415.] The officers also arrested appellant Cook on the same premises. [R. Tr. pp. 385, 545.]

Appellant Williams' purse was searched and $15 of the marked and recorded $750 was found therein. [R. Tr. pp. 500, 567.] The officers brought in the ultraviolet light and the following items fluoresced: the coffee table, the telephone, the clasp on appellant Williams' purse, $15 in the purse, appellant Williams' fingertips, and appellant Cook's fingertips and inside coat pocket. [R. Tr. pp. 375, 386, 500.] At the rear and to the side of the premises in a trash can labeled "5417½" the searchers, in the presence of appellant Williams, found two cans, each of which was sealed with scotch tape, and each contained several small manila envelopes with the tops stapled closed, which, in turn, contained a total of almost 4 ounces of heroin. [R. Tr. pp. 379-381, 421, 429-434, 460, 502-504.] The officers also found in the house: scotch tape [R. Tr. pp. 379, 422], a stapling machine [R. Tr. pp. 379, 422], several containers of milk sugar [R. Tr. pp. 502, 504, 422], an empty box which formally contained contraceptives [R. Tr. pp. 422, 545], six contraceptive wrappers [R. Tr. pp. 422, 545-546], and a box containing empty gelatin capsules. [R. Tr. p. 379.]

Shortly after appellant Cook was arrested he was asked if her knew where any narcotics were, and he stated that he believed there were narcotics out by the trash can because every time somebody came over to pick up narcotics Mrs. Williams (appellant) would go out there and rummage around in the cans. [R. Tr. pp. 483, 547.]

The search of the premises took between two and two-and-one-half hours to complete; thus, since the officers entered at approximately 3:00 P.M., they finished their search around 5:15 P.M. [R. Tr. pp. 416, 422.] Both appellants were kept at the premises during the entire search. [R. Tr. p. 416.] A woman deputy sheriff was also brought in, as one of the arrested persons was a female. [R. Tr. p. 432.] When the search was over, the officers and the appellants entered vehicles and drove to the Federal Building, 312 South Spring Street, Los Angeles, California, where they arrived at about 6:00 P.M. [R. Tr. pp. 648-649, 652.] The available United States Commissioner, whose offices are in the Federal Building, had already left for the day. [R. Tr. pp. 653-656, 682.]

On the following morning, February 25, 1958, complaints charging appellants with violations of the federal narcotic laws were sworn to before the United States Commissioner, and the appellants were arraigned before that United States Commissioner who committed them in lieu of their posting bail. [R. Tr. p. 653; Tr. pp. 1-2.] No officer contacted either of the appellants from the time they were booked in the County Jail until they were arraigned before the United States Commissioner. [R. Tr. p. 714.]

V.

ARGUMENT.

Preliminary Statement.

Appellants have seen fit to raise many points on this appeal at different stages and not always the same points at succeeding stages: 13 points specified in their statement of points upon which they intend to rely as filed in this Court; 11 assignments of error in their brief; and 5 points argued in their brief. Appellee found it necessary for the sake of logical refutation to group and classify appellants' various contentions, and shall proceed to refute all of the appellants' contentions under the following general headings:

1. The search and seizure at 5417½ South Wilton Place, Los Angeles, California;
2. Appellant Cook's confession;
3. The conspiracy instructions given to the trial jury;
4. The disclosure of the informer's identity;
5. The lies of the Government's witnesses;
6. The sufficiency of the evidence.

POINT ONE.

The Search and Seizure at Appellant Williams' Home, 5417½ South Wilton Place, Los Angeles, California, Was Legal as Incident to a Lawful Arrest, and the Property so Obtained Was Properly Admitted Into Evidence During the Trial.

A. Appellee's Position.

On February 24, 1958, the officers had probable cause to arrest both appellants on felony charges. The officers lawfully arrested appellants without warrants of arrest, and made a search and seizure incident to said arrests.

The property obtained as a result of this search and seizure was properly admitted into evidence. This of course is the position appellee took in the trial court, and constitutes the holding of the trial court.

B. Appellants' Claims.

At different times and in different proceedings appellants have claimed all of the following:

1. A search without a search warrant is invalid;
2. A search under a void search warrant is no good;
3. A search without a search warrant or a warrant of arrest is void.
4. The arrest of appellants was invalid.

C. Discussion of Probable Cause.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> U. S. Const., Fourth Amend.

Title 21, U. S. C., Section 174, makes it a felony for anyone to unlawfully sell, receive, conceal or transport heroin.

Title 26, U. S. C., Section 7606 authorized agents of the Federal Bureau of Narcotics to:

> "(2) make arrests without warrant for violation of any law of the United States relating to narcotic

drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The term "probable cause" as used in the Fourth Amendment and the term "reasonable grounds" as used in 26 U. S. C., Section 7607, have the same meaning.

United States v. Walker, 246 F. 2d 519 (7th Cir., 1957);

C. f., United States v. Bianco, 189 F. 2d 716 (3rd Cir., 1951).

On numerous occasions the Supreme Court has defined "probable cause" as follows:

"In dealing with probable cause, however, as the name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act.

* * * * * * * *

"The substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

Draper v. United States, 358 U. S. 307 (1959);

Brinegar v. United States, 338 U. S. 160 (1949);

Go-Bart Co. v. United States, 282 U. S. 344 (1931);

Husty v. United States, 282 U. S. 694 (1931);

Dumbra v. United States, 268 U. S. 435 (1925);

Carroll v. United States, 267 U. S. 132 (1925);

Steele v. United States, 267 U. S. 498 (1925);

Stacey v. Emery, 97 U. S. 642 (1878).

The first factual issue we must determine is whether or not the arresting agents had "probable cause" and/or "reasonable grounds" to arrest appellants. At the hearing on appellants' Motions to Suppress Evidence before Judge Mathes, Deputy Sheriff Gillette, one of the arresting officers, testified that in addition to all the other known facts, the officers: "had information . . . from a reliable confidential informant who stated she (appellant Williams) was selling narcotics from that location (5417½ South Wilton Place, Los Angeles, California), and that she (Williams) was a source of supply for Jewel Bryant." [R. Tr. pp. 286, 289-290.] The entire transcript of this hearing was made a part of the trial record at appellants' request. [R. Tr. pp. 245-246.] However, even at the trial Deputy Gillette testified: "I had information from a confidential informant, from Jesse Thomas, to the effect that Ruth Williams who lived at 5417½ Wilton Place, was engaged in the illegal sale of narcotics." [R. Tr. p. 238.]

As we saw above in the Statement of Facts: by the morning of February 24, 1958, the day of the arrests, the same agents had already received delivery of heroin from Bryant on the three separate indicated occasions, February

14, 17 and 21, 1958, and at the time of the first buy, Bryant apparently obtained her heroin from someone or some place in the vicinity of 54th and Wilton in Los Angeles, California; at the time of the second buy, appellant Williams was with Juanita Smith in appellant Cook's car at Bryant's residence while Burley and Bryant were negotiating a purchase of heroin, and shortly thereafter appellant Williams and Juanita Smith went to Williams' home, and then Juanita Smith, now driving Williams' car, returned to Bryant's home and apparently delivered heroin to Bryant; at the time of the third buy, Bryant took the Government's money, let Burley out of her car at a street corner, went directly to appellant Williams' residence, entered said residence, came out a few minutes later, joined Burley, and delivered the heroin to Burley.

The agents obtained warrants of arrests for Eddie Jewel Bryant and Juanita Smith on February 21, 1958. Whether or not the agents had "probable cause" or not to arrest appellant *before* any of the transactions of February 24, 1958, is not an issue herein, but if it were, it appears to appellee to be a real borderline situation. However, it is clear that the agents had probable cause to believe that heroin was being concealed at 5417½ South Wilton Place, Los Angeles, California—appellant Williams' residence. The agents went before United States Commissioner Hocke on February 24, 1958, and swore out affidavits stating, in essence, that on February 21, 1958, Deputy Burley arranged to buy an ounce of heroin from Bryant, and Bryant took Burley's money, proceeded directly to 5417½ South Wilton Place, and returned immediately therefrom with the heroin. [Tr. pp. 9-10; Ap. Brief, Append. pp. 2-3.] Based on these affidavits, the

Commissioner issued a search warrant. Obviously, the Commission was satisfied that the agents had probable cause to believe heroin was being concealed at the above-named location. This search warrant was subsequently ruled to be void on its face because it was properly filled out, but the grounds for obtaining this warrant were never challenged and never ruled upon.

After obtaining the search warrant, the officers made the final arrangements for the "big buy" on February 24, 1958, "dusting" and recording the serial numbers of the money, and placing themselves in positions of observation and cover. Deputy Burley then arranged to buy three ounces of heroin from Bryant, which was delivered in two installments. Appellant Williams was observed to leave her home, go to her yard, and return to her home. Appellant Cook was then seen to make two trips from Williams' home to Bryant's home and back again. Bryant was then arrested and part of the marked money recovered. The agents then assembled, exchanged, and correlated their information, and were ready to proceed. We might note here that agents who were about to arrest appellants were the same agents who had been on the entire case from its inception.

One further fact the agents possessed: they had checked the telephone and the utilities for 5417½ South Wilton Place, Los Angeles, California, and found them listed in the name of Ruth Williams.

Now we can answer the proposed question: Did the agents have probable cause to arrest appellants? It is very clear that an affirmative answer is the only possible answer.

Many decisions teach us that questions of probable cause can only be resolved upon the facts and circumstances present in each case, but sometimes analogies and comparisons are helpful.

On May 11, 1959, this Court of Appeal handed down its decision in *Rodgers v. United States,* No. 16,020, where in the Court, after a thorough analysis of the law and facts, found the agents had probable cause for the arrest of the defendant under 26 U. S. C., Section 7607(2), based on an unknown informant's statements that were buttressed by the agents' subsequent observations prior to arrest.

See, also:

Bell v. United States, 254 F. 2d 82 (D. C. Cir., 1958).

In the recently decided case of *Draper v. United States, supra,* the Supreme Court held that an experienced federal narcotics agent was justified in arresting and searching the defendant, when all the agents had was a tip from a reliable informant that the defendant was peddling narcotics. That Court, at page 310, stated:

> "The crucial question for us then is whether knowledge of the related facts and circumstances gave . . . (the federal agent) 'probable cause' within the Fourth Amendment and 'reasonable grounds' within the meaning of . . . (26 U. S. C. 7607), to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, then the arrest, though without a warrant, was lawful and the subsequent search of petitioner's person and the seizure of the found heroin were validly made incident to a law-

ful arrest, and therefore the motion to suppress was properly overruled and the heroin was competently received in evidence at the trial. *Weeks v. U. S.* 232 U.S. 383, 392; *Carroll v. U. S.,* 267 U.S. 132, 158; *Agrello v. U. S.,* 269 U.S. 20, 30; *Giordenello, U. S.,* 357 U.S. 480, 483."

The Court then decided that there was probable cause to arrest, and sustained: the arrest, the search, the seizure, and the admissibility into evidence of the property so seized. If the facts in the *Draper* case support a finding of probable cause, and they do, then it is inconceivable that the facts in the instant case could give rise to any other conclusion.

We conclude that prior to arresting appellants on February 24, 1958, the arresting officers had:

1. Authority to arrest without a warrant of arrest;
2. Probable cause to believe appellants *had* committed the felonies of selling, receiving, concealing, and transporting heroin;
3. Probable cause to believe appellants *were* then committing the felonies of receiving and concealing heroin.

D. Discussion of the Arrest.

We saw in the Statement of Facts above that at about three o'clock on the afternoon of February 24, 1958, the officers climbed the stairs to appellant Williams' home, knocked several times on the door, heard no response, tried the door, found it was unlocked, opened the door, stepped into the house, placed appellant Williams under arrest, and then placed appellant Cook under arrest. Appellants, in their brief, page 18, state that this is the testimony of the

officers, and at page 35 state that there is no dispute over the Government's version of these facts; however, appellants have added the screen door in the latter recitation of facts, but it is of no consquence. There appears to be some disagreement as to just when appellants were arrested. In appellants' brief we read:

> "The officers just opened the door and walked in without saying a word. (Citation.) The officers made a thorough search of the upstairs living quarters, the downstairs rumpus room, the washroom and the yard. (Citation.) After the search was over, appellants Williams and Cook were taken to the federal narcotics office in the Federal Building and were held there for about 3 hours. They were then booked in the Los Angeles County Jail on suspicion of a federal narcotics violation. (Citation.)
>
> "Appellants Williams and Cook were arrested some time in the late afternoon of the next day, February 25, 1958." (P. 9.)
>
> "The officers knocked on the screen door but received no response. They then tried the door, found it unlocked and entered the house. They presented the search warrant which Federal Narcotics Officer Richards had to Williams, who they found standing in one of the two bedrooms. Apparently, she had just gotten out of bed in response to the knocking, but the officers entered so quickly after a knock or so that she was unable to inquire as to who was coming in. After showing appellant Williams the search warrant, the officers used up about two hours . . ." (Pp. 35-36.)
>
> "That the entry into Ruth Williams' house and the so-called arrest and search of her premises . . ." (P. 38.)

"The appellants were not arrested until some 18 hours after the search had been completed. . . ." (P. 54.)

In each of these passages appellants overlook the arrest or belittle it, necessitating, we think, a look at the record.

Deputy Sheriff Farrington, one of the officers in the arresting party, testified at the motion to suppress:

> "After proceeding up the stairway to that residence, Deputy Gillette, Sgt. Landry, Agent Richards and myself—Deputy Gillette was the first officer facing the doorway. He knocked on the doorway several times. There was no answer. He opened the door and proceeded into which is the kitchen of the apartment. Deputy Gillette, Sgt. Landry and myself turned to our right and walked into the living room at which time we looked ahead of us and saw Mrs. Williams standing in the hallway, which is adjacent to the livingroom, bathroom, and two bedrooms. And at that time Deputy Gillette approached Mrs. Williams and placed her under arrest." [R. Tr. p. 349.]

There was no cross-examination of this witness by appellants at this time. At the trial of this case Deputy Farrington, on direct examination, testified:

> "Q. Will you tell us what you did when you entered that residence? A. Deputy Gillette placed Mrs. Williams under arrest . . ." [R. Tr. p. 234.]

On cross-examination of this witness, after establishing that the witness was thoroughly familiar with the inside of appellant Williams' home and was able to pinpoint the

exact position of the parties at the time of arrest, the following dialogue ensued:

> "Q. And, Officer Gillette walked up to her and said, 'I am arresting you for violation of the Federal narcotics laws'? A. Sgt. Gillette placed her under arrest. I did not hear his statement." [R. Tr. p. 415.]
>
> * * * * * * * *
>
> "Q. Now, when you—when Mrs. Williams was told that she was put under arrest where was Mr. Richards at that time? A. As we entered Mr. Richards stepped to his left . . ." [R. Tr. p. 417.]

On the motion to suppress Deputy Gillette testified on direct examination:

> "We knocked several times on the door, and there was no response. I then tried the door knob and it was open and I walked in. I walked past the kitchen into the livingroom and entered a hallway, where I observed the defendant Williams standing in the doorway to a bedroom. I then placed the defendant Williams under arrest and advised her of her constitutional rights.
>
> Q. (By the Court): What did you say to her? A. I said, 'Ruth, you are under arrest for violation of the Federal narcotics laws.'
>
> Q. (By the Court): What did you say to her. A. I told her she didn't have to make any statements if she didn't wish to, and that she should contact her lawyer and receive counsel as soon as possible." [R. Tr. pp. 271-272.]
>
> * * * * * * * *
>
> "Q. Was she placed under arrest before you started to search? A. Yes, sir." [R. Tr. p. 273.]

Then on cross-examination the witness testified:

"Q. You arrested her the minute you walked in, is that correct? A. That is correct." [R. Tr. p. 282.]

"Q. And then you got that information and then you walked in and arrested her and searched the place after you arrested her, is that correct? A. That is correct." [R. Tr. pp. 293-294.]

At the trial on cross-examination this witness again testified:

"Q. Well, what did you say to Ruth Williams when you walked in? A. I had my badge in my hand and I told her, 'Ruth, you are under arrest for violation of the Federal narcotics laws.'" [R. Tr. p. 517.]

Deputy Landry testified on direct examination on the motion to suppress as follows:

". . . Deputy Gillette knocked on the door several times. There was no answer. He then tried the door, and entered. I was immediately following behind him with, I believe, Farrington behind me. We entered through the door and into the livingroom, I believe, and toward a hall, at which time I observed Mrs. Williams standing in the hall doorway between what appeared to be a bedroom and a doorway. Gillette, my partner, walked up to her. I walked with him. And he stated, 'Ruth you are under arrest.'

Q. After placing her under arrest did you aid the officers in making a search of the premises? A. Yes, sir, I did." [R. Tr. p. 99.]

There was no cross-examination of this witness at this hearing.

This was essentially the evidence from the Government's point of view, but how about from appellants' point of view? Appellant Williams did not testify at the trial, but did testify at the hearing on the motion to suppress, where, on direct examination, she said:

"Q. Did you hear anyone knock? A. No.

* * * * * * * *

Q. Do you recall Sgt. Gillette who testified here this morning saying anything to you at all? A. I never seen him." [R. Tr. pp. 325-326.]

(To the same effect see appellant Williams' affidavits in support of her motions to suppress evidence. [Tr. pp. 23, 44.])

On cross-examination appellant Williams testified:

"Q. When were you placed under arrest, Mrs. Williams? A. The 24th of February.

Q. Who put you under arrest? A. Well, Malcolm Richards.

Q. Where were you when he put you under arrest? A. In my home.

Q. Whereabouts in your home? A. In my bedroom.

Q. Did he put you under arrest when he first came in your bedroom? A. Yes.

Q. This is prior to searching, he put you under arrest? A. No. He arrested me—yes. When he came in the room and showed me this thing he had in his hand.

Q. Then he put you under arrest? A. Yes.

Q. After that he searched the premises. A. Yes." [R. Tr. p. 332.]

From the foregoing excerpts, it is clear that the very first thing the officers did when they entered appellant Williams' home is to place her under arrest. After that she was served with a copy of the search warrant which was, in law, void.

We have thus established the time, place, and conditions of the arrest; and from these factors we must decide whether this is a legal arrest.

In order to determine the legality of this arrest it must first be determined whether federal law or state law is the yardstick. Appellants contend that the Federal Constitution and the Federal Rules of Criminal Procedure are the yardsticks and cite *Giordenello v. United States,* 357 U. S. 480 (1958), as authority. (Ap. Brief, p. 48.) Appellee answers that *Giordenello* is not authority for that proposition, and that the Supreme Court has many times held that the governing law of an arrest without a warrant is the law of the state in which the arrest is made.

In *Giordenello* the Court held that the complaint which gave rise to the Commissioner's warrant of arrest was defective because on its face it did not set forth possible cause; thus, the warrant of arrest was invalid, the ensuing arrest was invalid, and, finally the search and seizure incident to that arrest was illegal and the property seized inadmissible into evidence. The Government contended that even if the warranty of arrest was invalid, the arrest was justified apart from the warrant. On pages 487, 488, the Court said:

> "In this Court, however, its principal contention has been that the arrest was justified apart from the

warrant. The argument is that Texas law permits arrest without a warrant upon probable cause that the person arrested has committed a felony; that in the absence of a controlling federal statute, as in the case here, federal officers turn to the law of the State where an arrest is made as the source of their authority to arrest without a warrant, *cf. United States v. Di Re,* 332 U. S. 581, 589 (1948); *Johnson v. United States, supra* at 15; and . . .

"We do not think that these belated contentions are open to the Government in this Count and accordingly we have no occasion to consider their soundness.

* * * * * * * *

"This is not to say, however that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant."

Although the majority did not consider and pass on the Government's claim, the minority did, and said at page 492:

"But assuming that the claim is belated, it states the law and our duty is to apply it."

In *United States v. Di Re,* 332 U. S. 581, 589 (1948), the Court said:

"We believe, however, that in the absence of an applicable federal statute the law of the state where an arrest without a warrant takes place determines its validity."

See also:

Johnson v. United States, 333 U. S. 10, 14 (1948).

In the more recent case, *Miller v. United States,* 357 U. S. 301 (1958), the Court at page 305 stated:

> "This Court has said, in the similar circumstance of an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. (Citation.) By like reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia."

These three cases clearly hold that in the absence of "an applicable federal statute" the law of California should determine the legality of the arrests in the instant case. Is 26 U. S. C. 7607(2) "an applicable federal statute"? Obviously, this statute gives authority to arrest; but it says nothing about the means or methods of making such arrests. If this statute is "an applicable federal statute," and it appears to be, we would conclude that it then is the governing law as to whether the instant arrests were valid; and, if such be true, the only limitation of an arrest by an authorized agent would be its "reasonableness" under the Fourth Amendment to the Constitution of the United States. Appellee contends that in the instant case the agents acted as reasonable and prudent men would in the same or similar circumstances, and thus the arrest is valid.

The legislative history of 26 U. S. C. 7607(2), in addition to being educational and lengthy (46 pages), reveals the purpose of this amendment. The Subcommittee on Narcotics reported:

> "Your subcommittee's inquiry into the enforcement program revealed serious obstacles which have been placed in the path of enforcement officers as the

result of recent court decisions. These decisions have tended, under certain circumstances, to furnish the criminal with a cloak of immunity to the detriment of society as a whole. They have forced changes in recognized investigative procedures which had been sanctioned by the courts for many years. The narcotic traffickers, who are in most cases well-organized professional racketeers, take full advantage of any limitations placed on enforcement officers.

"In some instances enforcement officers have been restricted in their right to arrest without a warrant, and to search and seize contraband before and after a valid arrest. The use of evidence of admissions and confessions following an arrest has been curtailed. Narcotic enforcement officers are restrained from intercepting telephone conversations, even though the telephone is a major instrument of communication between the top narcotic traffickers, and could often provide the necessary evidence to convict these violators. The enforcement officers are required to secure an arrest warrant or a search warrant from a magistrate even though circumstances indicate the impracticability of such a procedure. Narcotic drugs are small in volume and high in price. A fortune in drugs can be concealed under clothing and can be destroyed or moved to a place of safety on a moment's notice. The delay involved in obtaining a warrant from a magistrate permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. These and other restrictions on enforcement officers leave the public unprotected and give narcotic violators, especially the more reprehensible larger racketeers and wholesalers, an advantage over law-enforcement officers in efforts to combat the illicit narcotic traffic. The subcommittee urges that corrective measures in

these areas be taken immediately to permit enforcement officers to operate more effectively.

"The stringency with which some courts apply rules relating to the admission of evidence bearing on narcotic law violations and the difficulty of obtaining warrants under certain circumstances have rendered the problems confronting enforcement officers that much more difficult to meet." (1956 U. S. Code Cong and Adm. News, p. 3302.)

At the present time there are very few circuit court decisions interpreting the scope and application of 26 U. S. C. 7607(2); however, there is one that is directly in point. In *United States v. Volkell,* 251 F. 2d 333 (2nd Cir., 1958), *cert. den.* 356 U. S. 962 (1958), federal narcotics agents with probable cause to arrest the defendants descended via a fire escape from the roof to the floor of the defendants' apartment, climbed into the apartment through an open window, arrested the defendants, and searched the premises. The Appellate Court held that the arrest was legal, the search and seizure was valid as incidental to a lawful arrest, and the property so seized was admissible into evidence. This holding was based solely upon the application of 26 U. S. C. 7607(2) to all of the facts of the case. The Court said:

"The scope of the word 'reasonable' must be construed in relation to the safeguards granted in the Fourth Amendment to the Constitution 'against unreasonable searches and seizures.' Obviously, what is 'reasonable' must be judged against a background of the facts known to the particular agent at the time of the arrest. . . . The agents had reasonable grounds to believe that appellant and Ambrasini had committed violations of the narcotics laws before their entry

into the apartment. The grounds upon which the agents acted more than satisfied the requirements of section 7607(2). The search thereafter was incidental to lawful arrest." (P. 336.)

It is noteworthy that the Supreme Court denied certiorari and that New York state law prohibits the breaking into a house to arrest without a warrant until the arresting officers announce themselves and their purpose.

Clevenger-Gilbert's N. Y. Crim. Code (1956), Sec. 178.

The only Supreme Court decision applying to 26 U. S. C. 7607(2) is the *Draper* case, *supra,* where the arrest was in a public terminal.

Appellee submits that under the rationale of the *Volkell* case, *supra,* the arrest in the present case must be upheld as lawful.

Other federal agents (F. B. I., Secret Service, U. S. Marshals) have the same statutory authority the federal narcotic agents obtained by 26 U. S. C. 7607(2), but decisions thereunder do not reach the parent issues. See:

18 U. S. C. 3052;

18 U. S. C. 3053;

18 U. S. C. 3056.

It is arguable that since 26 U. S. C. 7607(2) confers only the authority to arrest, the test of whether or not the exercise of that authority renders the arrest invalid is still dependent upon the law of the state in which the arrest is made. Although appellee feels that such an argument should lose, appellee is aware of the fact that this

is uncharted territory; hence, appellee feels bound to present this argument.

We agree with appellants that the participation of the federal officers with the state officers throughout the entire investigation makes the operation a federal one, at least for purposes of the "silver platter doctrine." However, the actual arrests in this case were made by state officers which in and of itself may be sufficient reason for applying the state law.

California Penal Code, Section 844 provides:

> "To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

The leading California case applying Section 844 is *People v. Maddox,* 46 Cal. 2d 301, 294 P. 2d 61 (1956), cert. den. 352 U. S. 85, 89 (1956). This was a narcotics case in which the police did not literally follow Section 844, but the court excused strict compliance stating:

> "It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. [7] Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a

> place where he is entitled to be more quickly than he would, had he complied with section 844. [8] Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose . . . Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance . . . Moreover, since the officer's right to invade defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees . . . We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains." (P. 306.)

In *People v. Cahill,* 163 Cal. App. 2d 15, 328 P. 2d 995 (1958), also a narcotics case, the court said:

> "It was not necessary for the officers to exercise the authority given to them under section 844, Penal Code, because the officers merely opened an unlocked door and entered the premises without objection." (P. 19.)

In *People v. Ramsey,* 157 Cal. App. 2d 185, 320 P. 2d 531 (1958), an abortion case, the police, without warrants of any kind, once used a pass key to enter a private home, and the second time when the pass key would not

open the door, smashed the door in; and on each occasion arrested the people inside, searched the premises and used the evidence so obtained at the time of trial. The Court upheld all of the arrests and the searches incident thereto, citing *Maddox, supra.*

In *People v. Morris,* 157 Cal. App. 2d 81, 320 P. 2d 67 (1958), a narcotics case, the Court, citing *Maddox, supra,* upheld the arrests when:

> "Without knocking or giving any warning of any kind, the officers broke the lock and entered the room." (P. 82.)

In *People v. Shelton,* 151 Cal. App. 2d 587, 311 P. 2d 859 (1957), a bookmaking case, the police, with a search warrant, rang the bell, waited, then forced their way in with a sledgehammer, and the court, affirming the conviction said:

> "The cases hold that where compliance with this provision (Sec. 844, Penal Code) would probably frustrate the arrest or permit destruction of incriminating evidence compliance is not required." (P. 588.)

For other similar cases, see:

People v. Miller, 162 Cal. App. 2d 96, 328 P. 2d 506 (1958);

People v. Barrett, 156 Cal. App. 2d 803, 320 P. 2d 128 (1958);

People v. Thomas, 156 Cal. App. 2d 117, 318 P. 2d 780 (1957);

People v. Andrews, 153 Cal. App. 2d 333, 314 P. 2d 175 (1957);

People v. Guerrera, 149 Cal. App. 2d 122, 307 P. 2d 940 (1957);

People v. Potter, 144 Cal. App. 2d 350, 300 P. 2d 889 (1956);

People v. King, 140 Cal. App. 2d 1, 294 P. 2d 972 (1956);

People v. Sayles, 140 Cal. App. 2d 657, 295 P. 2d 579 (1956).

It is apparent that under the law of California as applied, the arrest in the instant case would be valid.

It is also apparent that the California law is practically identical with the law the Supreme Court applied in the *Miller* case, *supra.* But note, that the Court therein recognized the existence of justification for noncompliance with such state laws:

> "There are some state decisions holding that justification for noncompliance exists in exigent circumstances, as, for example, when the officers may in good faith believe that they or someone within are in peril of bodily harm, *Read v. Case,* 4 Conn. 166, or that the person to be arrested is fleeing or attempting to destroy evidence. (*People v. Maddox,* 46 Cal. 2d 301, 294 P. 2d 6.)
>
> "But whether the unqualified requirements of the rule admit of an exception justifying noncompliance in exigent circumstances is not a question we are called upon to decide in this case." (P. 309.)

We conclude that:

1. The arrest was made immediately upon the entrance of the officers into the house, and before any search was conducted;

2. The arrest is valid as a reasonable arrest under 26 U. S. C. 7607(2);

3. The arrest is valid under California law.

E. Discussion of the Ensuing Search and Seizure.

Appellee has experienced considerable difficulty in ascertaining exactly what appellants contend in regard to the search and seizure and what they contend is the governing law.

All the federal courts have made it clear that a search and seizure incident to a lawful arrest, even without a warrant of arrest, is valid, and the property so obtained is admissible into evidence.

Draper v. United States, 358 U. S. 307, 310 (1959);

United States v. Rabinowitz, 339 U. S. 56, 66 (1950);

United States v. Di Re, 332 U. S. 581, 589 (1948);

Harris v. United States, 331 U. S. 145 (1947);

United States v. Lefkowitz, 285 U. S. 452 (1932);

Agnello v. United States, 269 U. S. 20 (1925);

Carroll v. United States, 267 U. S. 132, 158 (1925);

Abel v. United States, 258 F. 2d 485 (2nd Cir., 1958), *cert. granted,* 358 U. S. 813 (1958);

Work v. United States, 243 F. 2d 660, 662 (D. C. Cir., 1957);

Papani v. United States, 84 F. 2d 160, 162 (9th Cir., 1936);

Baumboy v. United States, 24 F. 2d 512, 513 (9th Cir., 1928);

Brown v. United States, 4 F. 2d 246 (9th Cir., 1925).

In the *Di Re* case, *supra,* the court said:

"If he was lawfully arrested, it is not questioned that the ensuing search was admissible." (P. 587.)

In the *Carroll* case, *supra,* the court said:

> "When a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." (P. 158.)

This *Circuit* in the *Papari* case, *supra,* said:

> "The general rule is 'that one's house cannot lawfully be searched without a search warrant; "and the exception thereto is that one's house may be lawfully searched without a search warrant" as an incident to a lawful arrest therein.' " (P. 162.)

Appellants, on page 39, *et seq.,* of their brief, rely heavily on *Johnson v. United States,* 333 U. S. 10 (1948), and state:

> "We see no way to distinguish the *Johnson* case from the case at bar except that our case is a stronger one against the Government than the *Johnson* case."

The *Johnson* case is easily distinguished from the instant case in that in *Johnson* the court held that there was no probable cause for the arrest and the arrest was incidental to the search, and, as appellee has pointed out, in the instant case there is probable cause to arrest and the search was incidental thereto. Also for the current standing of *Johnson,* see below.

Appellants also rely heavily upon *Trupiano v. United States,* 334 U. S. 699 (1948), and *McDonald v. United States,* 335 U. S. 451 (1948), wherein searches were not upheld because there was time to get search warrants.

In 1950, the Supreme Court was again called upon to determine the reasonableness of a search, without a warrant, incident to a lawful arrest, and in *United States v. Rabinowitz,* 339 U. S. 56, 66, the majority said:

> ". . . to the extent that *Trupiano v. United States* requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled."

And Justice Frankfurter in dissent said:

> ". . . in overruling *Trupiano* we overrule the underlying principle of a whole series of recent cases: *United States v. Di Re,* 332 U. S. 581, *Johnson v. United States,* 353 U. S. 10, *McDonald v. United States,* 335 U. S. 451."

Although the arrest in *Rabinowitz* was made upon a warrant of arrest, the principle remains the same even if the arrest was made without a warrant, if it was a legal arrest.

In the recent case of *Abel v. United States, supra,* the Circuit Court pointed out, at page 492:

> "With the single exception of *Trupiano v. United States* (citation) . . . overruled in *United States v. Rabinowitz, supra,* the Supreme Court has consistently held that government agents may, as incident to lawful arrest, conduct a search of the premises where the arrest is made."

Appellants cite *Work v. United States,* 243 F. 2d 660 (D. C. Cir., 1957), as "directly in point." However, in that case the court held at page 662:

> "We should add that the search and seizure were not incident to a valid arrest which could have made

it reasonable without the necessity for a search warrant. In fact there was no arrest at all preceding the search and seizure."

This clearly is not true in the instant case.

Appellants rely on *Jones v. United States,* 357 U. S. 493 (1958), as authority that:

> "Where a search warrant is required for the search of a home, there can be no such thing as entry into the home and search of it without a search warrant whether or not the search is incident to a valid arrest." (Ap. Brief, p. 49.)

That is not the holding of the case. The facts of the case show that there was no arrest inside of the house, and the Court carefully explained why *Rabinowitz* was not applicable. The Court said, at page 499:

> "The case of *United States v. Rabinowitz, supra,* upon which the District Court relied, has no application here. There federal agents, without a search warrant, explored the office of the defendant and thereby obtained evidence used against him at trial. But immediately after entering the office and before their search, the agents executed a warrant they had previously obtained for the defendant's arrest. The Court stressed that the legality of the search was entirely dependent upon an initial valid arrest. (Citation.) The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them. (Citations.) None of these exceptions obtains in this case."

Appellants, on page 29, state that "the arrest of the accused without a warrant is no more defensible than a search under a void search warrant," and cite *Baumboy*

v. United States, 24 F. 2d 512 (9th Cir., 1928), as their authority.

In the *Baumboy* case the search warrant was defective because its supporting affidavits did not state facts sufficient to constitute probable cause, and although the agents arrested defendant without a warrant before searching, they knew no more than was stated in the affidavits for the search warrant. The Court holding that there was no probable cause to sustain the arrest said at page 513:

> ". . . it is urged that the seizure may be justified as an incident of the arrest, but the arrest was, to say the least, no more defensible than the search."

Appellants, on page 30, state:

> "Belief on the part of the arresting officers, however well-founded, that narcotic drugs were concealed in appellant Ruth Williams' dwelling house, furnished no justification for the search of her home without a warrant. Searches of homes without a warrant have universally been held to be unlawful notwithstanding facts unquestionably showing probable cause.

As authority for this appellants cite, *inter alia, Agnello v. United States,* 269 U. S. 20 (1925). The *Agnello* case stated:

> "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as incident to a lawful arrest therein." (P. 32.)

Appellants' citation is not complete. The decision says:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal

> or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. (Citation.) Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." (P. 33.)

Although appellants state: "Where a home, as Ruth Williams' was, is entered by officers without a warrant for the purpose of making an arrest . . .", on page 30, and then apparently contradict themselves by stating, on page 31: "When it appears, as it did here, that the search of Ruth Williams home and not the arrest was the real object of the officers entering upon the premises . . .", no supporting references to the transcript of record are provided as to what the officers' purpose was when they entered appellant Williams' home.

The arresting officer testified on cross-examination:

> "Q. And you went in to assist him with serving the search warrant, is that it? A. I went in to assist him and to arrest the defendant and then—
>
> Q. No, that isn't what I asked you . . ." [R. Tr. p. 275.]

The federal agent, Richards, testified on cross-examination:

> "Q. And then did you say to him (Officer Gillette) you arrest Mrs. Williams and then I will serve the search warrant afterwards? Did you say that to him? A. No, I didn't say that.

Q. How did it happen that Gillette just walked up and arrested her? A. Well, we were going to arrest her, anyway, for her participation.

Q. Who was going to arrest her, the Federal officers or the State officers? A. We work in conjunction with each other, so—

Q. (By the Court): Who was the first one in the house? A. Officer Gillette was the first one." [R. Tr. pp. 318-319.]

Deputy Farrington, one of the officers in the arresting party, testified:

"Q. (By the Court): Was a search warrant your authority for entering the place? A. No, sir, it was not. I entered 5417½ Wilton Place for the express purpose of arresting the defendant Williams." [R. Tr. p. 239.]

There is no testimony to the contrary. In addition to the above quoted testimony of the officers, we saw, above, that upon entering the premises the first thing the officers did was to place appellant Williams under arrest, and then serve her with a search warrant. It is apparent that the arrest was not a pretext for the search, but rather that the arrest was a motivating object.

Other cases cited by appellants are easily distinguished from the case at bar.

In *Kraemer v. United States,* 353 U. S. 346 (1957), the court held the search was illegal because the agents took everything that was in the cabin searched, and removed the items some 200 miles.

In *Brown v. United States,* 4 F. 2d 246 (9th Cir., 1925), the court held the arrest was based on mere sus-

picion, rather than probable cause. Same holding *Poldo v. United States,* 55 F. 2d 866 (9th Cir., 1932).

In *Williams v. United States,* 237 F. 2d 789 (D. C. Cir., 1956), the court held: "The arrest of appellant was illegal because without a warrant, without probable cause, and without other validating circumstances."

In *Lee v. United States,* 232 F. 2d 354, 355 (D. C. Cir., 1954), the court held: "The testimony shows that the search and seizure preceded the arrest, and the officers intended by the entry and search to secure evidence upon which to predicate the subsequent arrest."

The court, in the instant case, after the hearing on the motion to suppress, signed and filed a written order denying the motion. [Tr. pp. 36-38.] This order was supported by findings of fact, including:

> "5. That the arresting officers on February 24, 1958 had probable cause to believe that defendant Ruth Johnson Williams had committed a felony and that defendant Ruth Johnson Williams was committing a felony, and the arrest without a warrant of arrest was a lawful arrest.
>
> "6. That the defendant Ruth Johnson Williams was placed under arrest . . . prior to any search . . .
>
> "7. That the search . . . was a reasonable and valid and legal search incident to a lawful arrest. . . ." [Tr. p. 37.]

Appellants do not argue that the arresting officers lacked probable cause to arrest appellants, although they do claim the judge erred when he ordered their motion denied.

Appellee admits that the lower court found the search warrant "wholly inadequate and insufficient on its face" [Tr. p. 37]; however, appellee contends that from this fact all that can be concluded is that the search warrant standing alone cannot justify the search. The insufficiency of the search warrant does not carry over, effect or affect the validity of the arrest. In *United States v. Lefkowitz,* 285 U. S. 452 (1932), the court while sustaining a search of a house incident to a lawful arrest therein, pointed out that even if the warrant for arrest is invalid, if the arresting officer had probable cause upon which to arrest then the arrest is valid. (See *Giordenello v. United States, supra.*)

The scope of the search and seizure in the instant case was reasonable in view of all the circumstances; including: appellant Williams arrested at junction of at least 3 rooms, appellant Cook arrested on the lower floor, appellant Williams was seen heading toward the trash cans prior to the delivery of any narcotics on February 24, 1958, and appellant Cook's statement to the officers at the time of his arrest.

See:

Rabinowitz v. United States, 339 U. S. 56 (1950);
Harris v. United States, 331 U. S. 145 (1947);
Hamer v. United States, 259 F. 2d 274 (9th Cir., 1958).

We conclude:

1. The search and seizure was incident to a lawful arrest, and as such valid.

2. The evidence so obtained was admissible.

3. The scope of the search and seizure was reasonable.

F. The Search and Seizure and Appellant Cook.

This point is not discussed by appellants. The first motion to suppress evidence was culminated with a hearing, and a written order was made only on behalf of appellant Williams. [Tr. pp. 19-20, 36-38; R. Tr. pp. 65, 250.] In the second motion to suppress evidence and during the trial appellant Cook was always joined with appellant Williams in the attempts to suppress the evidence obtained as a result of the search of Williams' home. [Tr. pp. 41, 87-89.]

The law is clear that one must have "standing" in order to move to suppress evidence on the claim that it is the fruit of an illegal search and seizure. To obtain this standing the claimant must demonstrate some possessory interest in the premises searched or claim some proprietary interest in the property seized.

United States v. Lefkowitz, 285 U. S. 452 (1932);

Lovette v. United States, 230 F. 2d 263 (5th Cir., 1956);

Fisher v. United States, 227 F. 2d 930 (9th Cir., 1955), motion den., 229 F. 2d 860 (9th Cir., 1956);

Gaskins v. United States, 218 F. 2d 47 (D. C. Cir., 1955);

Shurman v. United States, 219 F. 2d 282 (5th Cir., 1955);

Scoggins v. United States, 202 F. 2d 211 (D. C. Cir., 1953);

Ingran v. United States, 113 F. 2d 966 (9th Cir., 1940);

Kwong How v. United States, 71 F. 2d 71 (9th Cir., 1934).

Appellant Cook nowhere claims either requisite interest, hence he has no standing to object to the admission into evidence of the property seized at appellant Williams' home. Also, Cook is not charged with the "possession" of the heroin found there, and all of the non-narcotic property that was seized there and put into evidence was offered and received in evidence only as to appellant Williams.

G. Admissibility of Non-Narcotic Property Seized.

Appellants contend that the non-narcotic property seized is inadmissible into evidence because, in addition to being illegally seized, it is incompetent, irrelevant and immaterial, and no proper foundation was laid for its admissibility. (Ap. Brief, pp. 50-51.) Appellants state that the Government made a blanket offer of the articles inventoried on the return of the search warrant, and specify Exhibits 7, 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D, and 9. Appellants then contend:

> ". . . that the admission of the conglomerate paraphernalia such as cans of milk sugar, corn starch, a half box of .32 caliber bullets, some rolls of scotch tape, some empty milk sugar cans, a stapling machine with a supply of staples, a shiek box with wrappings of six contraceptives, a paper tablet with certain markings, and things of the sort which were included in the exhibits, does, above all else, require a reversal of this case. . . ."

Appellants' lack of specificity is as noticeable as their use of sweeping generalities. It would appear that appellants believe that the "half box of .32 caliber bullets" and a "paper tablet" were received in evidence. Appel-

lants do not connect up the above listed Exhibits with the "conglomerate paraphernalia," but appellee will and does:

Exhibit 7 is seven manila envelopes, each containing heroin, that were stapled shut, and were found in a scotch taped, sealed can in appellant Williams' trash can. [Tr. p. 68; R. Tr. p. 382.]

Exhibits 7-A and 7-B are copies of the list of the serial numbers of the money used on the last buy.

Exhibit 8 is the box which was used to store all the non-narcotic property so as to prove continuity of possession. It was not offered into evidence, and was not received in evidence. [R. Tr. pp. 375-377.]

Exhibit 8-A is the three rolls of scotch tape, and they were offered and received into evidence. It is noted that the cans in which the heroin was found were sealed with scotch tape. [R. Tr. pp. 377, 382-384.]

Exhibit 8-B is the stapling machine and was offered and received into evidence. The envelopes which contained the heroin were stapled shut. [R. Tr. pp. 377, 379, 382-383.]

Exhibit 8-C is the box of empty gelatin capsules commonly used to store narcotics in. It was offered and received into evidence. [R. Tr. pp. 379, 382-383.]

Exhibit 8-D is the can marked "Golden Crumbles" in which the envelopes containing heroin were found. It was offered and received into evidence. [R. Tr. pp. 379-380.]

Exhibit 9 appears to be seven manila envelopes containing heroin. It was offered and received into evidence.

(From the record, Exhibits 7 and 9 are difficult to distinguish.) [R. Tr. pp. 382-384, 503.]

The Government also put into evidence Exhibits 8-E, 8-F, 8-G, 8-H and 8-I which are also non-narcotic properties, but appellants did not object to them and in their brief appellants do not refer to them; so neither will appellee, except to say that none of them are the "half box of .32 caliber bullets" or a "paper tablet," which were not offered or received into evidence at any time. [R. Tr. pp. 503-505.]

It is apparent that we do not even reach the holding of *Kremen v. United States,* 353 U. S. 346 (1957), and if we did, it is not applicable here as the agents seized only what was permissible.

POINT TWO.

The Truthfulness of the Officers' Testimony Regarding the Arrest of the Appellants Without a Warrant Is and Was Unimpeachable.

It appears that appellants blandly contend that they were not arrested by the officers at the time of their entry into appellant Williams' home, and the testimony of the four officers to that effect is a lie that "the officers cooked up" when they learned from appellant Williams' Motion to Suppress Evidence that their search warrant was void. (Ap. Brief, pp. 54-55.)

It is obvious that appellants have no compunctions about calling anyone a liar if it suits their convenience, and that they are dedicated to the slogan "Win at all costs."

Their contention not only has no evidence to support it, but it also blatantly contradicts the evidence. No refer-

ences are made to the transcript to support this claim. In fact, if it were not for the seriousness of this accusation, it could be called a laughable absurdity, because the appellants are in effect admitting perjury. Both appellants testified under oath at some stage of the proceedings, and both of them admitted that they were arrested in appellant Williams' home [R. Tr. pp. 332, 755]; yet, they now call anyone who so states a liar—perhaps they exclude themselves as being above the law.

This contention of appellants should be branded for what it is—a fable, and ignored by this Court.

POINT THREE.

Disclosure of the Informant's Identity.

Appellants contend that when the Government witnesses disclosed the identity of their confidential informant as one "Jesse Thomas" they did not disclose the identity of their confidential informant. (Ap. Brief, p. 56.) When appellants equate "Jesse Thomas" with "John Doe," they are obviously still claiming the officers are liars. There is no basis for this blatant and unwarranted claim. The officers testified at length concerning how long they had known Jesse Thomas and where they met him. [R. Tr. pp. 238, 286, 289-290.]

On April 28, 1958, at the hearing on Appellant Williams' motion to suppress evidence, the identity of the informant was disclosed. [Tr. p. 36; R. Tr. pp. 286, 289-290.] On May 20, 1958, the trial commenced. [Tr. p. 62.]

Appellants state: "The indifference of the officers to the identity of 'Jesse Thomas' who, according to their testimony, was a participant in the offenses charged in the indictment, requires a reversal of the convictions. . . ." (Ap. Brief, p. 56.)

This quotation contains a misstatement of fact. As was indicated above in the Statement of Facts, Jesse Thomas was active in this case on the 10th to the 13th of February, 1958. The earliest date that appears in the Indictment, including the conspiracy count, is February 14, 1958.

The Government was faithful to the holding of *Roviaro v. United States,* 353 U. S. 53 (1957), when it disclosed the identity of its informant.

The court in *Soto v. United States,* 256 F. 2d 733, 734 (7th Cir., 1958) may have had appellants in mind when they said: "Just how any information concerning an informer . . . would aid the defense . . . is unexplained in this record save for some unconnected utterances of . . . counsel . . ."

In *United States v. Gernie,* 252 F. 2d 664 (2nd Cir., 1958), the court pointed out that the Government is not obligated to call as a witness the informant who had worked with the agents or to account for his absence under the circumstances of the case and where the defense had the means of securing information as to his whereabouts. The court, at pages 668-669, said:

> "Furthermore, there was no showing that the government had any more information as to . . .

(the informant's) whereabouts than was available to the defense."

"*Roviaro v. United States* . . . is not in point as the defendant knew who the informant was."

In the narcotics case, *Eberhardt v. United States,* 262 F. 2d 421, 422 (9th Cir., 1958), this court said:

"But the failure of the Government to produce an informer or other person as a witness does not violate the defendant's rights. *Curtis v. Rives,* 75 U. S. App. D. C. 66, 123 F. 2d 936; *Dear Check Quong v. United States,* 82 U. S. App. D. C. 8, 160 F. 2d 251. The Government has no duty to place on the witness stand every person with some knowledge of the circumstances. *Curtis v. Rives,* supra."

See also:

Williamson v. United States, 262 F. 2d 476 (9th Cir., 1959);

Amaya v. United States, 247 F. 2d 947 (9th Cir., 1957);

Sorrentino v. United States, 163 F. 2d 627 (9th Cir., 1947).

It is noteworthy that this particular argument of appellants, like the one before it (Point Two), was not designated as one of their points on appeal in—"Appellants' Statement of the Points upon Which They . . . Intend to Reply on This Appeal," filed in this Court.

POINT FOUR.

The Evidence Is Sufficient to Sustain the Convictions of the Appellants.

Appellants contend that the evidence is insufficient to sustain the conviction, but they do not indicate wherein the alleged deficiency of the evidence lies. They do not cite any necessary element of the offenses that was not proven.

It is a maxim of the law that the evidence must be viewed in the light most favorable to support the judgment.

Glasser v. United States, 315 U. S. 60 (1942);

Robinson v. United States, 262 F. 2d 645 (9th Cir., 1959);

Reynolds v. United States, 238 F. 2d 460 (9th Cir., 1956);

Arena v. United States, 226 F. 2d 227 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956).

Appellee submits that the evidence as indicated above in the Statement of Facts is sufficient to sustain the convictions.

POINT FIVE.

The Confession of Cook Was Properly Admitted Into Evidence.

Appellant Cook's contention appears to be that his confession is not admissible into confession because it was obtained from him during a period when he was illegally detained.

Without rehashing the facts, we saw that appellant Cook was arrested at appellant Williams' home at about

3:00 in the afternoon of February 24, 1958. Both appellants were kept on the premises during the search in accordance with good law enforcement practice as it prohibits to some extent a subsequent accusation such as "They didn't find it at my place, they must have planted it." When the search was concluded, between 5:00 and 5:30 P.M., the appellants were brought to the Federal Building, arriving there at about 6:00 P.M. Both appellants were questioned at the Federal Building by Agent Richards, and both appellants were taken across the street and booked in the County Jail shortly after 8:00 P.M. During this two-hour period appellant Cook confessed. Before he confessed he was again told he did not have to make a statement. He was also given a sandwich and allowed to make a telephone call to his wife. Agent Richards testified that the reason he questioned appellants was to determine the background information for report purposes. (Statement of Facts, *supra.*)

The traditional criterion used by the federal courts in determining the admissibility of an extra-judicial confession was whether or not it was made freely, voluntarily and without compulsion, inducement, or coercion.

> *Wilson v. United States,* 162 U. S. 613 (1896);
>
> *Ziang Sung Wan v. United States,* 266 U. S. 1 (1924).

At the present time the Federal courts, when dealing with confessions, have emphasized not the constitutional fact, but rather whether or not the confession was obtained at a period when the defendant was being illegally detained as far as Rule 5(a) of the Federal Rules of Criminal Procedure is concerned.

Rule 5(a) provides:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

The following four Supreme Court decisions have plotted the recent course of confessions in federal courts:

McNabb v. United States, 318 U. S. 332 (1943);
United States v. Mitchell, 322 U. S. 65 (1944);
Upshaw v. United States, 335 U. S. 410 (1948);
Mallory v. United States, 354 U. S. 449 (1956).

A thorough discussion of the development of the non-constitutional test of confessions in federal courts is given in the article: "The McNabb-Mallory Rule: Its Rise, Rationale and Rescue," by James E. Hogan and Joseph M. Snee, S. J., in 47 Georgetown Law Journal 1, 1958. The authors point out *inter alia* the number of different types of court-approved necessary delays in arraignments before the commissioner.

Appellee also strongly recommends the Report of the Committee on the Judiciary of the United States Senate entitled "Improving Federal Law Enforcement and Administration of Justice." (S. Rept. No. 1478, 85th Cong., 2d Sess. (1958)), wherein the problem is studied and discussed including the views of Judge Alexander Holtzoff who served as secretary of the Supreme Court's Advisory Committee on the Federal Rules of Criminal Procedure.

The nearest United States Commissioner in the instant case is Theodore Hocke, who has offices in the Federal Building, and he testified that his office hours are from 9:00 A.M. to 4:30-5:00 P.M. [R. Tr. p. 682.] Thus, the instant case is distinguishable from *Mallory* in that here there was no commission available, and appellant Cook was advised of his right to remain silent and to obtain counsel before he voluntarily confessed.

In *United States v. Mitchell, supra,* the Court held that only a confession obtained during illegal detention is inadmissible and all pre-arraignment confessions are not automatically bad, and upheld the admissibility of the pre-arraignment confession therein.

Appellee urges this Honorable Court to follow its own lead as set forth in such cases as:

United States v. Leviton, 193 F. 2d 848 (2d Cir., 1951), cert. den. 343 U. S. 946 (1952);

Haines v. United States, 188 F. 2d 546 (9th Cir., 1951), cert. den. 342 U. S. 888 (1951);

Symons v. United States, 178 F. 2d 615 (9th Cir., 1949), cert. den. 339 U. S. 985 (1950);

United States v. Walker, 176 F. 2d 564 (2d Cir., 1949). cert. den. 338 U. S. 891 (1949).

Appellee also cites the following cases as correctly applying the law:

Washington v. United States, 258 F. 2d 696 (D. C. Cir., 1958);

Porter v. United States, 258 F. 2d 685 (D. C. Cir., 1958);

Trilling v. United States, 260 F. 2d 677 (D. C. Cir., 1958).

Appellee concludes that appellant Cook's confession was properly received in evidence as an extrajudicial confession, voluntarily given, while he was being lawfully detained.

VI.
CONCLUSIONS.

1. The search and seizure at apellant Williams' home, was legal, as incident to a lawful arrest, and the property so obtained was properly admitted into evidence.

   a. The agents had authority to arrest without a warrant of arrest.

   b. The agents had probable cause to believe that appellants had and were committing felonies.

   c. The agents arrested appellants immediately upon their entrance into appellant Williams' home.

   d. The arrests of appellants are valid under either federal law or California law.

   e. The search and seizure was incidental to the arrests.

   f. The scope of search and seizure was reasonable.

   g. Appellant Cook has no standing to object to the search and seizure.

   h. The property seized was admissible into evidence including the non-narcotic property.

2. The officers' testimony regarding the arrests of the appellants was true and unimpeached.

3. The Government disclosed the identity of the confidential informant.

4. The evidence is sufficent to sustain and support the conviction.

5. Appellant Cook's confession was properly admitted into evidence.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney, Chief, Criminal Division,

THOMAS R. SHERIDAN,
Assistant United States Attorney,

Attorneys for Appellee United States of America.